MALAYSIAN REPORTS

ILLIAN & ANOR. v. PUBLIC PROSECUTOR

[S.C. (Wan Suleiman, Mohamed Azmi & Syed Agil Barakbah S.C.JJ.) February 23, 1987 and January 30, 1988]

[Kuala Lumpur – Supreme Court Criminal Appeal No. 26 of 1985]

Criminal Law – Dangerous drugs – Charge of trafficking in – Presumptions under Dangerous Drugs Act 1952 – Burden of proof on accused to rebut presumption – Proof on balance of probability – Dangerous Drugs Act 1952, ss. 37 & 39B.

Criminal Procedure – Defence of alibi – No legal burden on accused to establish alibi – Accused has only to raise reasonable doubt – No duty upon accused to call any evidence – Application by prosecution to call evidence in rebuttal – Criminal Procedure Code (F.M.S. Cap. 6), ss. 402A & 425.

Evidence – Burden of proof – Onus on accused person – Burden to rebut a presumption on balance of probabilities – Raising reasonable doubt on prosecution case – No duty on defence to call witness – Failure to do so should not be made subject of comment – Evidence Act 1950, s. 114(g).

The two appellants were charged with jointly trafficking drugs. The evidence adduced by the prosecution was that a police party saw two males cycling together into the compound of the Kangar Hospital, and also subsequently saw one of them hand two plastic bags to the other. The police closed in to arrest the two persons. The police were able to arrest the second appellant who immediately dropped both bags. The other person then snatched one of the bags, fled and escaped. Subsequently some five months later, the first appellant was arrested when he came to the Kangar Magistrate Court in connection with some traffic offence. He was identified by the ASP in charge and one other member of the police party who were in the Kangar Hospital compound earlier. The two appellants were subsequently charged and at the trial the learned judge found that the prosecution had established a *prima facie* case against both the appellants and their defence was called.

The second appellant in his defence said that on the day in question he went with Ah Lian, a stranger, to the Kangar Hospital and there that person handed him a plastic bag to be given to one Ah Chai. He therefore handed the plastic bag to Ah Chai, who was then coming out of a car nearby. Immediately after that, he was arrested and his companion who had earlier said his name was Ah Lian snatched the plastic bag from Ah Chai and ran whilst Ah Chai got into his car and drove off. The second appellant insisted that the first appellant was not the person called Ah Lian, who had handed the plastic bag to him in the Kangar Hospital compound.

The defence of the first appellant was an alibi. He claimed to be in Padang Besar, Thailand from November 16, 1978 till November 20, 1978 and in support he produced a border pass, the genuineness of the contents of which was challenged by the prosecution.

The learned trial judge found both the appellants guilty and they appealed to the Supreme Court. At the appeal, it was argued *inter alia:*

(a) that the learned judge had applied the wrong onus in considering the defence of alibi raised by the first appellant. The learned judge had said "the onus on the defence is on the balance of probability";

(b) that the learned judge was in error in remarking that "it is incumbent upon the defence to call this witness, let alone object to the calling of the witness". The prosecution had sought to call an immigration officer to rebut the evidence of the first appellant but this had been refused by the learned judge.

Held: (1) the learned trial judge was in error in not making a distinction between the burden to rebut a presumption on a balance of probability and a burden to raise a reasonable doubt on the evidence led by the prosecution;

(2) the learned trial judge was in error in stating that the onus on the defence, where the defence is one of alibi, is on the balance of probability. The burden is the usual evidential burden cast upon an accused person, that is to raise a reasonable doubt;

(3) the presumption under section 37(d) of the Dangerous Drugs Act 1952 that the person affected is deemed to have been in possession and to know the nature of the drug "until the contrary is proved" and, in section 37(da) of the Act, deemed to be trafficking in the drug until the contrary is proved means that the burden resting on a party to a civil proceedings that is on a balance of probability is applicable.

(4) as regards the defence of alibi, all that an accused person need to do is to raise a reasonable doubt that he was the person at the scene of the crime. The proper approach is for the learned trial judge to consider at the close of the defence case whether he had indeed succeeded in doing so. Since in his case the learned trial judge may have applied the heavier burden, then he had misdirected himself;

(5) section 114(g) of the Evidence Act cannot be invoked against an accused person nor can the failure of the accused to call any witness be made the subject of comment at a criminal trial. The learned trial judge was therefore in error in remarking that it was incumbent on the defence to call the immigration officer in this case;

(6) the appeal court is unable to say whether the learned judge would have found the first appellant guilty had he rightly directed himself on the two important issues of law abovementioned. The appeal of the first appellant should therefore be allowed and he be acquitted and discharged;

(7) as regards the second appellant, his conviction was supported by the evidence on material particulars. He was caught red handed with the dangerous drugs and the learned trial judge was entitled to reject his defence having regard to the facts and surrounding circumstances of the case.

Cases referred to:

(1) *Dato Mokhtar bin Hashim & Anor.* v. *Public Prosecutor* [1983] 2 M.L.J. 232 (not folld).
(2) *Yau Heng Fang* v. *Public Prosecutor* [1985] 2 M.L.J. 335 (folld).
(3) *R.* v. *Johnson* (1961) 46 Cr. App. R. 55 (apprvd).

(4) *Rex* v. *Carr Briant* [1943] 1 K.B. 607 (apprvd & folld).
(5) *Goh Ah Yew* v. *Public Prosecutor* [1949] M.L.J. 150, 153 (folld).

SUPREME COURT.

Karpal Singh for the first appellant (assigned).

G. Naughton Christie for the second appellant.

Zaini Abdul Rahman (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (delivering the judgment of the court): In this appeal we should bear in mind that the first appellant represented by Encik Karpal Singh is really the second accused Illian s/o Endin and the second appellant Yu Kiat Ho represented by Mr. Naughton Christie is the first accused. To save ourselves from confusion, we shall hereinafter refer to the first appellant as Illian and the second appellant as Yu.

The appellants had been charged with jointly trafficking in dangerous drugs, the charge being as follows:

"That you on the 19th day of November, 1978 at about 3.15 p.m. at the Compound of Hospital Kangar in the District of Kangar, in the State of Perlis did jointly traffic on your own behalf a dangerous drug, to wit 1077.2 grammes of morphine and 257.9 grammes of heroin and thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and punishable under section 39B(2) of the said Act."

On information received by PW.2 ASP Zulkifli, he and a police party had waited in ambush in the Kangar Hospital compound. The prosecution evidence is that Zulkfli then saw two males cycling together into the compound at about 3.15 p.m. Having parked their bicycles one of them handed two plastic bags to the other. Zulkifli then signalled Det. Sgt. Hashim (PW. 4) to close in and arrest the two. The latter arrested one of the appellants who immediately dropped both bags. The other then snatched one of the bags and fled, pursued by ASP Zulkifli and two other members of the ambush party.

The cyclist apprehended was Yu. Having thrown down the plastic bag, the other cyclist ran through the hospital building and crossed a river some distance away from the hospital whereupon the chase was discontinued. Some five months later, Illian was arrested when he came to the Kangar Magistrate Court in connection with some traffic offence. He was identified by ASP Zulkifli and by one other member of the police party who had participated in the ambush at an identification parade subsequently held as being the one who had got away.

The learned trial judge found that the prosecution had established a *prima facie* case against both appellants and their defence was accordingly called.

Briefly, Yu's defence was that he had on the day in question struck up a conversation with a person who said he was called Ah Lian, a total stranger whom he met whilst having a drink at a coffee stall. He found out that the latter was also going to the Kangar Hospital, and together they cycled thereto. When they arrived there, Ah Lian handed to Yu a plastic bag asking him to hand it to another person he indicated, whose name he said was Ah Chai, apparently because he was having some difficulty in locking his bicycle. The person so indicated was then coming out of a car nearby. Yu accordingly handed the plastic bag to Ah Chai. Immediately after that he was arrested and his companion who had earlier said his name was Ah Lian snatched the plastic bag from Ah Chai and ran whilst Ah Chai got into his car and drove off.

Yu insisted that Illian is not the person called Ah Lian, the person who had handed over the plastic bag to him in the hospital compound that afternoon. Illian, he said, was an old friend of his, whilst the missing Ah Lian was until that afternoon a total stranger.

Illian's defence was an alibi. While confirming that Yu is an old friend, he said that he was nowhere near the Kangar Hospital compound on the day in question. He claimed to have been in Padang Besar, Thailand from November 16, 1978 until November 20, 1978. In support, he produced a border pass, the genuineness of the contents of which was challenged by the prosecution.

Regarding Yu, the judge said that he had not rebutted the presumptions on a balance of probability nor had he raised a reasonable doubt in the evidence led by the prosecution, and found him guilty. We must again perforce say that here again the learned judge appears to regard both burdens as being the same.

Whilst we are on the same matter, his Lordship had even earlier shown that he made no distinction

between the two burdens as would appear again and again in various parts of his judgment. To cite another example, under the heading "Court's finding", he had earlier recorded: "The court always borne in mind the onus on the defence is slight *i.e.* to rebut the statutory presumptions on the balance of probability and to raise a reasonable doubt in the prosecution's evidence."

Accordingly he found both appellants guilty, hence the appeal.

A number of important points of law were raised during the appeal, the most notable of which is that regarding section 402A of the Criminal Procedure Code. Section 402A reads:

"402A.(1) Where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support thereof shall not be admitted unless the accused shall have given notice in writing thereof to the Public Prosecutor at least ten days before the commencement of the trial.

(2) The notice required by subsection (1) shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi."

Encik Karpal Singh submits that the judge applied the wrong onus in considering the defence raised by Illian. On the matter of onus, where the defence is one of alibi the learned trial judge said (at p. 160) "the onus on the defence is on the balance of probability (see illustration (b) to section 103 of the Evidence Act)." In so doing, he appears to be following the Federal Court decision in *Dato Mokhtar bin Hashim & Anor.* v. *Public Prosecutor*[1] where at p. 280 appears the following passage:

"The learned judge in considering the defence of alibi appears to have decided the question on a balance of probabilities, thus throwing a probative but somewhat lighter burden on the first appellant. It is contended before us that this was wrong approach as all that an accused person need do is to cast a reasonable doubt and that he does not in putting forward an alibi as an answer to a charge assume any burden of proving that answer, and we have been referred to English cases to this effect in support of this submission. The position here, however, would appear to be different in view of the provisions of section 402A of the Criminal Procedure Code with regards to notice to be given of a defence of alibi which was added by way of amendment to the Code with effect from January 10, 1970. The concluding words of section 402A(2) 'for the purpose of establishing his alibi' are significant and would seemingly put a probative burden on an accused. The position in England would appear to turn on the specific provisions of section 11 of the Criminal Justice Act 1967 and we would refer in particular to the provisions of subsection (1) and the definition of 'evidence in support of an alibi' in subsection (8) thereof. The Supreme Court of India held in *Gurucharan Singh & Anor.* v. *State of Punjab* that the burden of proving an alibi undoubtedly lies on the accused setting up the defence but even so, the burden of proof as to the guilt of the accused always remains on the prosecution irrespective of whether or not the accused has made out a plausible defence. In *Public Prosecutor* v. *Chidambaram & Anor.* it was held that alibi evidence should be scrutinized very carefully, for it is easy to set up an alibi and not always easy to prove it, and it must be definitely proved in order to suffice for the rebuttal of a case made out by the prosecution."

However, this was not followed in the Supreme Court decision in *Yau Heng Fang* v. *Public Prosecutor*[2] where the burden of proof under that same section was held to be the usual evidential burden cast upon an accused person, *i.e.* to raise a reasonable doubt. In the above case, this court cited with approval the English Court of Criminal Appeal decision in *Anthony Hugh Johnson*[3] wherein it was said in respect of alibis:

".... an alibi is commonly called a defence, but it is to be distinguished from some of the statutory defences, such as the defence of diminished responsibility under the Homicide Act 1957, where Parliament has specifically provided for a defence, and has further indicated that the burden of establishing such a defence rests on the accused. It may be that the true view of an alibi is the same as that of self-defence or provocation. It is the answer which the accused puts forward, and the burden of proof, as will appear in a moment, in the sense of establishing the guilt of the accused, rests throughout on the prosecution. If a man puts forward an answer in the shape of an alibi or in the shape of self-defence, he does not in law thereby assume any burden of proving that answer. So much, in the opinion of this court, is plain on the authorities."

In *Yau Heng Fang's* case[2] Mohamed Azmi S.C.J. said at p. 340 in an oblique reference to the Federal Court decision in *Dato Mokhtar's* case:[1]

"It may be argued that because of the words, 'establishing his alibi', there is now a statutory burden on the accused so that since January 10, 1976 when the new section was introduced by Act A324, an accused person has to prove his alibi on the balance of probabilities. The object of section 402A(1) is to make provision for a written notice to be given by the defence to the Public Prosecutor if the defence of alibi is to be raised at the trial, and section 402A(2) merely provides the particulars required to be given in such notice. Nothing more should be read in that section, and we do not think it is the intention of the legislature by that section in the Criminal Procedure Code to introduce a new legal burden on the accused to establish his defence."

We have not lost sight of the fact that under section 37(d) a person found to have custody or control of any dangerous drug shall be deemed to be in possession and to know the nature of such

drugs until the contrary is proved, and under section 37(da) such person found in possession of 15 grammes or more of morphine and heroin (the amount found was alleged to be 1077.2 grammes of morphine and 257.9 grammes of heroin) shall be presumed to be trafficking in the aforesaid drugs, again until the contrary is proved.

It would perhaps be clearer if we consider what has to be proved before the presumption under section 37(da) of the Act can become operative. Firstly, the prosecution would have to make out a *prima facie* case that Illian is one of the two persons found in custody or control of the drugs seized. At an identification parade some five months later, Illian was identified by ASP Zulkifli (PW.2) and Det. Cpl. Subramaniam (PW.8) as the person who had handed the two plastic bags containing the drugs to Yu and who then fled. The court held that since he was in joint custody and control of the drugs with Yu, the statutory presumption under section 37(d) and (da) came into effect.

The learned judge therefore found that a *prima facie* case had been made out against both appellants which if unrebutted would warrant their conviction.

Here, we should perhaps pause to remark that the presumption under section 37(d) that the person affected is deemed to have been in possession, and to know the nature of the drug "until the contrary is proved" and, in section 37(da), deemed to be trafficking in the drug again "until the contrary is proved", which as long ago as the well-known decision in *Rex* v. *Carr Briant*[4] means that burden resting on a party to civil proceedings *i.e.* on the balance of probability. At that stage, it would appear that this error on the part of the learned trial judge is in favour of Illian and certainly no ground for complaint by him, nor would the error prejudice Yu.

But here Illian is alleging that he was not at the relevant place at all so that all he needed to prove to be entitled to an acquittal was to create a reasonable doubt that he was one of the two persons (the other being Yu) who had been found in possession of the drugs.

In view of what we have already stated earlier *i.e.* that as regards the defence of alibi all that the accused person need to do is to raise a reasonable doubt that he was not the person at the scene of the crime, then the proper approach is for the learned trial judge to consider, at the close of the defence case, whether he had indeed succeeded in doing so. Since he may well have applied the heavier burden in making no distinction between the two (which is properly applicable only to the issue of possession of the drug and trafficking), then he had indeed misdirected himself.

Learned counsel also drew our attention to the treatment by the learned trial judge of an item of evidence produced by the defence in the course of trial to establish a defence of alibi, namely, a Border Pass – exhibit D8.

The learned Deputy alleged that he had been caught by surprise by the production of this document, and we thought it strange indeed in view of the requirement of section 402A of the Criminal Procedure Code to give ten days' notice of their intention to raise a defence of alibi, and the additional requirement under subsection (2) "to include particulars of the place where the accused claimed to have been at the time of the commission of the offence with which he is charged together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi".

The application by the learned Deputy to call an immigration officer under section 425 of the Criminal Procedure Code to give evidence to rebut the evidence was refused, according to the learned trial judge, in order to maintain his impartiality, yet his Lordship chose to remark (at p. 164) that "it is incumbent upon the defence to call this witness, let alone object to the calling of the witnesses", referring to the defence's objection of the calling of the immigration officer on the question of authenticity of the Border Pass, despite those authorities which make it more than abundantly clear that section 114(g) of the Evidence Act cannot be invoked against an accused person or for that matter failure to call any witnesses made the subject of comment to the jury at a jury trial.

Thus, in *Goh Ah Yew* v. *Public Prosecutor*[5] the Court of Appeal held that:

> "No inference can be drawn against an accused person in a criminal trial. There is no duty upon an accused person to call any evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other."

We are unable to say whether the learned trial judge would have found Illian guilty had he

rightly directed himself on the two important issues of law abovementioned. In deciding not to put this appellant in jeopardy of his life twice in the event of ordering his retrial, we were persuaded by two other facts which appear to be in his favour. Firstly, would he, as learned counsel posed the question to us, have turned up at the police station within the jurisdiction if he had really escaped to Thailand to avoid arrest merely to answer a charge for a minor traffic offence and thereby court arrest, if he had participated in a capital offence committed just before that knowing full well that the police would be looking for him? Secondly, we also note that Yu denied that Illian was ever with him at the time of his arrest.

As regards Yu, we are of the opinion that his conviction is supported by the evidence on material particulars. He was caught red handed with the morphine and heroin, and the learned trial judge was entitled to reject his defence having regard to the facts and surrounding circumstances of the case.

Accordingly, we would acquit and discharge Illian, but would uphold the conviction against Yu Kiat Ho and affirm the sentence imposed.

Order accordingly.

Solicitors: *Karpal Singh & Co.; Naughton Christie & Co.*

HAJI OSMAN BIN HAJI AROFF & ANOR. v. ABDUL KARIM BIN PIN

[S.C. (Salleh Abas L.P., Seah & Syed Agil Barakbah S.C.JJ.) June 9 & August 22, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 373 of 1986]

Administrative Law – Disciplinary proceedings by State football association against football player – Decision to impose ban for a period of three years – Application for declaration that decision is a nullity – Whether player still under jurisdiction of football association – Purported resignation not valid.

Sports – Football association – Disciplinary proceedings against player – Purported resignation – Decision to ban player.

The respondent was an employee of the Kedah Regional Development Authority (KEDA), which had established a sports club and was an affiliate of the Kedah Football Association. The respondent had represented his employers in soccer and from time to time had played for the Kedah State football team. On December 3, 1985, the respondent tendered notice of resignation with KEDA by sending a telex and on the same day played a friendly game of football for a Kuala Lumpur football club. Disciplinary proceedings were taken against the respondent as he had contravened certain articles of the Constitution of the Kedah Football Association. The Disciplinary Committee of the Association imposed a ban of five years. The respondent read of the ban in the newspapers and wrote to the Secretary of the Kedah Football Association complaining that he had not been given an opportunity to be heard and defend himself. The respondent was subsequently informed that his appeal would be heard by the Disciplinary Board of the Association. The appeal was heard and the respondent appeared before the Committee, which reviewed the case and reduced the ban to three years. The respondent then applied to the High Court to declare the decision to be a nullity. The learned Judge held that the respondent's resignation was valid and therefore he had ceased to be an employee of KEDA and he was therefore not subject to the jurisdiction of the Kedah Football Association and its Disciplinary Committee. The appellants, the President and Secretary of the Association appealed.

Held: (1) there was no provision in the contract of employment between the respondent and KEDA for the termination of service by giving twenty four hours notice simpliciter. The purported resignation of the respondent was not valid;

(2) the respondent was therefore still under the jurisdiction of the Kedah Football Association when the infringement took place and was subject to the Constitution of the Association;

(3) under Article 49 of the Constitution of the Association the respondent had to obtain the prior approval of the Association before participating in a football match outside the State of Kedah. He had failed to do so and the Association was justified in taking action against him;

(4) the three-year ban against the respondent shall be effective within Kedah only because the jurisdiction of the Kedah Football Association is limited to within the State.

SUPREME COURT.

E. Mayandi for the appellants.

Vincent Chandran (*K. Manoharan* with him) for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the judgment of the court): This is an appeal against the decision of the High Court Judge, Alor Setar, Kedah, made on August 10, 1986, in favour of the respondent and *inter alia* declaring that the decision of the Kedah Football Association (KFA) imposing a ban on the respondent from playing football for a period of three years is a nullity. The two appellants are the President and the